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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 719

ROBERT A. BENNETT,
Appellant,

vs.

STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTORY

Appellant, a young attorney and counsellor at law of the State of Mississippi, appeals from the final order and judgment of the Supreme Court of Mississippi entered July 8, 1968, denying his petition for rehearing, and its judgment entered June 10, 1968, affirming the judgment convicting him of receiving stolen property and sentence of appellant to pay a fine of $250.00 and costs, and disbarring him from

the practice of law. His disbarment was suspended and he was placed on probation for a period of five years by the trial judge. The State Supreme Court affirmed the judgment of conviction on direct appeal, and on cross appeal the suspension of the disbarment order was reversed and said order reinstated.

OPINION BELOW

The Circuit Court of Harrison County, Mississippi, did not render an opinion. The opinion of the Supreme Court of Mississippi, affirming the judgment of the Circuit Court, is reported in 211 So.2d No. 2, July 18, 1968, pages 520-530, and said opinion is set forth in the Appendix, infra.

JURISDICTION

The judgment of the Mississippi Supreme Court affirming the judgment of the Circuit Court of Harrison County, was entered June 10, 1968. Petition for rehearing was timely filed and denied without opinion on July 8, 1968. Notice of appeal to this Court was filed August 1, 1968. By order signed by Mr. Justice Black on October 15, 1968, the time for docketing this cause on appeal was extended to and including November 6, 1968.

The jurisdiction of this Court to review the final judgment of the Mississippi Supreme Court is conferred by 28 U. S. Code §§ 1257(2) and 2103.

Appellant's challenge to the constitutionality of the statute by which he was prosecuted, Mississippi Code 1942, section 2249, was denied (Record, p. 13B). His claims he was searched and the property seized and placed in evidence against him, and that he was arrested, without warrants, violated his constitutional rights, under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, by motions to quash the indictment, to

return said property to him, and to suppress such evidence, were overruled by the trial judge without opinion, and without a finding. The Supreme Court of Mississippi, 211 So.2d 520, 525, said it had no argument with appellant's contention that *Mapp v. Ohio*, 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and other authorities cited by appellant, accurately state the law and are accurate pronouncements of the rule with reference to an unconstitutional search and seizure and the inadmissibility of evidence obtained thereunder, but said the facts "in these cases are clearly distinguishable from the case at bar," and "It is to be remembered that in the case at bar the felony was committed in the presence of the officer," and "No search warrant was necessary as *the stolen property was seen in appellant's possession by an officer just prior to his arrest.*" The opinion of the State Court says, "Chief of Detectives E. P. Vincent had *reasonable grounds to suspect* that appellant was committing a felony in violation of Mississippi Code 1942, Annotated, section 2249 (1956) * * *." Continuing, on page 526, 211 So.2d 520, the opinion says: "In the case at bar the appellant was notified *subsequent to the time that Mr. Vincent seized the money* out of appellant's hand that he was under arrest."

Appellant's claims the State did not prove the ownership of the property as laid in the indictment, and that Alexander had parted with said property in consideration of immoral and illicit sexual relationships with Linda Bailey, alias Gigi Marquette, in his motel room, and could not recover said property, and that appellant was entitled to have the trial judge so instruct the jury, were disposed of by the State Supreme Court, 211 So.2d 520, 527, holding: "The possession of the property is not involved in the prosecution of the suit against appellant and the legality or illegality of the purported contract likewise has no place in this cause. State's prosecuting witness,

Alexander, was entitled to receive the property which had been stolen from him subsequent to the disposition of the case."

The refusal of the trial judge, affirmed by the State Supreme Court, to instruct the jury (Record, pp. 332-333) concerning the illegality of the agreement between appellant's client, Linda Bailey, alias Gigi Marquette, and Alexander to engage in illicit sexual relations, as bearing upon his title and ownership of said property, and his rights to recover it, deprived appellant of his right to have the jury pass upon his said defense, and violated his constitutional right to a fair trial by due process of law, according to the law and the evidence.

The State Supreme Court's further action in approving the ruling of the trial court in granting three instructions for the State, the one discussed in the opinion at pages 527-528, and the two urged in the petition for rehearing filed in the State Court, dealing with the burden of proof upon the prosecution to prove appellant guilty beyond a reasonable doubt and to a moral certainty, and to the exclusion of every reasonable hypothesis of his innocence, Record, pp. 313 and 314, deprived appellant of a fair trial under the due process of law and the equal protection of the law clauses of the Fourteenth Amendment of the U. S. Constitution.

Cases believed to confer on this Court jurisdiction to review the judgment of the State Supreme Court are as follows: *Mapp* v. *Ohio,* 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Lanza* v. *New York,* 370 U. S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384; *Beck* v. *Ohio,* 379 U. S. 89, 85 S.Ct. 223; and *Ker* v. *California,* 374 U. S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Mississippi Code of 1942, Annotated, section 2249 (1956):

"Larceny—receiving stolen goods.

If a person buy or receive in any manner or on any consideration personal property of any value, feloniously taken away from another, knowing the same to have been so taken, he shall be guilty of receiving stolen goods, and, on conviction, shall be punished by imprisonment in the penitentiary not more than five years, or by imprisonment in the county jail not more than six months, and by fine, not more than two hundred and fifty dollars."

Fourth Amendment, U. S. Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, U. S. Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, U. S. Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether the crime of receiving stolen property from his client, who was then claiming it had been given to her in consideration of illicit sexual acts to be performed with former owner, charged against said attorney at law may be committed in the presence of an arresting officer whose only information the property was actually stolen, is derived from an affidavit by alleged owner and said officer had no knowledge or way of knowing said attorney knew the property was stolen by his client then charged with said theft, and no knowledge or way of knowing the said attorney intended to convert said property to his own use and benefit.

2. Whether arrest of defendant without warrant was constitutionally valid where, at moment the arrest was made, the officer had no probable cause to make it, because at that moment his only information was obtained from a person who claimed to be the owner and as such had made an affidavit against the person charged with stealing said property, which said person was the client of the attorney charged with receiving said stolen property.

3. Whether the constitutional validity of the search and seizure in the case against appellant may be determined independently of the constitutional validity of the arrest

of appellant; that is, whether the constitutional validity of the search of appellant, and the seizure of evidence from him, depends upon the constitutional validity of his arrest.

4. Whether under the rule of *Mapp* v. *Ohio*, 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the watch, ring, cigarette lighter, release bearing signature of appellant's client, Linda Bailey, alias Gigi Marquette, and the currency taken from appellant by Detective Vincent, in the amount of $200.00, were wrongly admitted in evidence against appellant because they had been seized by said named officer in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Whether it is sufficient for a state appellate court to make a finding in a case involving constitutional questions of illegal search and seizure and wrongful arrest without sufficient record evidence to support such finding, or must such finding be made by the trier of the facts in the first instance so as to safeguard defendant's rights in criminal cases, under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

6. Whether the finding made by the State Supreme Court in the case against appellant is sufficient protection of his constitutional rights, under the Fourth, Fifth and Fourteenth Amendments to the U. S. Constitution, and whether the prosecution had the duty to show with sufficient specificity the reliability of the officer's information and why officer thought information was credible and reliable.

7. Whether the search of appellant, under the circumstances of this case, was lawfully made, and whether appellant was properly, that is, lawfully and legally, arrested by officer Vincent.

8. Whether the failure of the State Supreme Court to reverse the judgment convicting appellant of receiving

stolen property from his client, who claimed said property was given to her in consideration of illicit sexual relations with the former owner, based on the error in granting and refusing instructions which did not embody the law of burden of proof on the prosecution to prove appellant guilty beyond a reasonable doubt and to a moral certainty and to the exclusion of every reasonable hypothesis of his innocence, and failed to submit to the jury the requested instruction on the question of ownership and right to possession of said property as laid in the indictment violated appellant's rights under the due process of law and the equal protection of the law clauses of the Fourteenth Amendment to the U. S. Constitution.

STATEMENT OF THE CASE

Appellant Bennett, a young practicing attorney and counsellor at law, under indictment for receiving stolen property from his client, Linda Bailey, alias Gigi Marquette, who claimed the property, a watch, ring and cigarette lighter were given to her in consideration for acts of illicit sexual relations with the former owner, Alexander, was tried to the court and jury, convicted and sentenced to pay a fine and disbarred from the practice of law. On appeal to the Supreme Court of Mississippi, the judgment on the jury verdict was affirmed and the suspension of his disbarment by the trial judge set aside and the order of disbarment reinstated.

Prior to trial on the merits appellant filed motions to quash the indictment, for return of the seized property and to suppress the evidence (Record, pp. 3-6, 8-10, and 11-12), on the grounds such evidence procured and obtained from him was incompetent because it was obtained in an unlawful and illegal manner, without search warrant and without a warrant for his arrest. His testimony in support of said motions, appearing at Record, pp. 19-30, was not con-

tradicted or disputed. In fact, the prosecution said it had nothing to offer at the time. Without a finding, the trier of the facts overruled the three motions, and the case proceeded to trial on its merits after which appellant moved to exclude the evidence and direct a verdict in his favor (Record, pp. 162-166), on the grounds, among others, the evidence used against him in such trial was obtained by an unconstitutional search and seizure, and therefore was inadmissible and would vitiate his conviction. Said motion to exclude and direct verdict in appellant's favor was overruled (Record, p. 166).

The State Supreme Court affirmed and held the facts in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and other cited cases, are clearly distinguishable from the case at bar, and the felony in the case at bar was committed in the presence of the officer. The court said, "No search warrant was necessary as the stolen property was seen in appellant's possession by an officer just prior to his arrest." The court further said: "Chief of Detectives E. P. Vincent had reasonable grounds to *suspect* that appellant was committing a felony in violation of Mississippi Code 1942 Annotated section 2249 (1956) * * *," and "In the case at bar the appellant was notified subsequent to the time that Mr. Vincent seized the money out of appellant's hand that he was under arrest." In support of its affirmance, the State Supreme Court further stated: "In the presence of Chief of Detectives Vincent and Mr. Taylor, appellant passed the stolen property to Mr. Alexander. This act was seen by Mr. Vincent, who saw the stolen property in the hands of appellant, and therefore justified the arrest by Mr. Vincent of appellant and the taking of the evidence from him. We have held the eye cannot commit a trespass and we hold that the arrest in the case at bar was legal and did not violate any of the appellant's rights under the United States Constitution or the Constitution of the State of Mississippi."

Appellant's assignment of error(s) in the grant and refusal of instructions for the State and appellant was answered by the State Court in a way to deprive appellant of a fair trial in violation of the due process of law and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States. Although there is abundant record evidence to support appellant that the watch, ring and cigarette lighter of State's witness Alexander were given to Linda Bailey, alias Gigi Marquette, in consideration for an immoral and illegal contract to engage in sexual intercourse with him, the State Court in effect says, all right so you contend and have offered evidence to prove your contention that Alexander entered into such immoral and illegal contract with your client, Linda Bailey, alias Gigi Marquette, and she says Alexander gave her the property for such purpose, but you are not permitted to submit the matter to the jury by proper instructions, and even though the decided cases of this court hold that in cases such as this, depending upon circumstantial evidence for conviction, the rule is that the jury must be instructed that the burden of proof is upon the State to prove guilt beyond a reasonable doubt and to a moral certainty and to the exclusion of every reasonable hypothesis of innocence, the error of the trial judge will not be corrected and you will not be granted a new trial, but such errors will be overlooked and your conviction, notwithstanding such errors, will be and is affirmed.

THE QUESTIONS ARE SUBSTANTIAL

1-7. The State Court held appellant's arrest was lawful because the crime (of receiving stolen property) "was committed in the presence of the arresting officer" and "he had reasonable grounds to *suspect* that appellant was committing a felony in violation of Mississippi Code 1942, Annotated, section 2249 (1956) * * *," contrary to this Court's

decision in *Beck* v. *State of Ohio,* 379 U. S. 89, 85 S.Ct. 223, and cases cited including *Carroll* v. *United States,* 267 U. S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543, where the court said the facts available to the officers at the moment of the arrest should "warrant a man of reasonable caution in the belief that * * *," not "reasonable grounds to suspect," as the State Court held at page 525, 211 So.2d. The only testimony on the question was given by appellant in his own behalf. The prosecution did not introduce any evidence in support of the arrest of appellant and in support of the seizure of evidence and property from him. In *Beck* v. *Ohio,* supra, the court held that where the constitutional validity of an arrest is challenged, it is the function of the court to determine whether the facts available to the officers at the moment of the arrest would "warrant a man of reasonable caution in the belief that an offense has been committed," citing *Carroll* v. *United States,* 267 U. S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543, and, further, that "If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function, * * *." Hence, the question posed is substantial and of great moment, and the Court must consider, determine and decide the matter. This question cannot be answered unless, until, and without first considering and answering the all-important questions posed for decision in this one big question. This is all too true because of the vast and innumerable instances where this Court has answered these very same questions, and rendered the many decisions like *Beck* v. *Ohio,* supra, and forerunner cases of that stripe against the contention of the State and in opposition to the opinion of the State Court.

The precedents established by this Court do not support the decision of the Mississippi Supreme Court. In fact, they require reversal of the decision appealed to this Court.

The crime of "receiving stolen property" is not committed, in fact, it cannot be committed, in the presence of an arresting officer unless such officer at that very moment can look into the recesses of the mind of the offending party, and reasonably conclude that he, such offending person, knew the said property had, in truth and in fact, been actually stolen, being the property of the person from whom it was charged it had been stolen, and with the present intent and purpose to convert said property to his, such offending person's own use and benefit. *United States* v. *Frisch*, CA5th, 140 F2d 660, 662. Otherwise, in order to convict a person charged with receiving stolen property, knowing it to have been stolen, with the intent and purpose to convert (such property) to his own use and purpose, much would be left to conjecture and surmise, if not pure guess and speculation—and the whole law governing the subject would be as naught and go out the window. Suspicion that the crime is being committed is not enough; there must be facts upon which to base a reasonable conclusion a crime is then being committed in the presence of the arresting officer. Facts, not suspicion, must sustain a reasonable belief that a crime has been, or is then being committed in the presence of such arresting officer. Nothing else will do; otherwise, the officer must be armed with a warrant for the arrest of such offending person. The arrest of such offender, in those precise circumstances, will then, and only then, support search and seizure without a search warrant, which latter must also be based on probable cause. The question(s) implicit in these premises, and inherent here are substantial and important to the continued adherence to the constitutional principles announced by this Court. The State Court found the arresting officer, E. P. Vincent, had reason to "suspect" the crime was being committed. Such finding is not sufficient. There was no finding by the

trier of the facts, the circuit judge. He made no finding, and the prosecution did not approach the problem. The record is devoid of any proof to sustain the opinion the search and seizure and the arrest were lawful and based on probable cause, for crime actually committed in the presence of such arresting officer.

Validity of search versus validity of arrest. This Court has repeatedly held that for a search and seizure incidental to an arrest to be valid the arrest must be valid and that evidence seized without a valid search because of an illegal arrest, cannot be admitted in evidence and will not sustain a conviction based on such improperly admitted property and material in evidence against an accused. For example, *Mapp* v. *Ohio*, 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and *Beck* v. *Ohio*, 379 U. S. 89, 85 S.Ct. 223.

This question is substantial; it is within reach of the constitutional guarantee of freedom from unlawful search and seizure and unlawful arrest, and the right of individuals to be secure in their person and property from unlawful search and seizure and to be immune from arrest without warrant based on probable cause, protected by the Fourth Amendment.

The only matters pointed to by the State Supreme Court, in support of its decision that the search and seizure of the evidence from appellant, and then his arrest by Officer Vincent, were based on facts different from *Mapp* v. *Ohio*, supra, and *Lanza* v. *New York*, 370 U. S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384, decided by this Court, and *Smith* v. *Mississippi* and *Brooks* v. *Mississippi*, decided and cited by the State Court, and hence, distinguishable from the case at bar, are the search and seizure of such evidence and the arrest of appellant by such officer were lawful because the crime charged against appellant

was committed in the presence of the said arresting officer. There is nothing, absolutely nothing, in the record to sustain the statement of such State Court that the felony charged against appellant was committed in the presence of said officer, and that such officer had substantial ground, based on sufficient facts, to believe, and not *suspect* as the opinion states, that appellant Bennett was then committing a felony in violation of Mississippi Code 1942, Anno., section 2249 (1956), which purports to describe the crime charged against appellant here. In the very next paragraph of the State Court's opinion, it is solemnly said, "the appellant was notified *subsequent* to the time that Mr. Vincent seized the money out of appellant's hand that he was under arrest."

8. Appellant defended the case against him in large part on the premise(s) that Alexander had made an immoral and illegal contract with his client Linda Bailey, alias Gigi Marquette, and because of said illegal contract he, Alexander, had lost his property rights in, and title to, and hence the right to possess and recover possession of, the watch, ring and cigarette lighter. He so testified and his witnesses testified that in the presence of Alexander and his said client, viz: Linda Bailey, alias Gigi Marquette, she, the said Linda, alias Gigi, said Alexander gave her the watch, ring and lighter in consideration for her acts of illicit sexual relations with him to be performed in his motel room. He is abundantly supported by substantial record evidence. The trial court's refusal to grant his request for jury instruction embodying his said defense was approved by the State Supreme Court, saying the legality of the contract was not involved, nor was Alexander's right to possession of his said property at the conclusion of the case involved in the prosecution against appellant.

Since it is fundamental that the ownership of property claimed to have been stolen must be proven as laid in the indictment, and the same rule applies to prosecutions for receiving stolen property, it is axiomatic and fundamental that the contention of appellant that the witness Alexander parted with his watch, ring and cigarette lighter under such circumstances, that he could not recover them was highly material to appellant's defense of the charge against him in the State Court that the jury be instructed on the law of immoral and illegal consideration. See 17 Am Jur2d 548-549, Contracts, Section 184, dealing with agreements for, or between those having, illicit sexual relations, and cases cited, where it is said that a loan by a man to a woman on consideration that she serve as his mistress cannot be recovered by him, citing *Harlow* v. *Leclair*, 82 NH 506, 136 A 128, 50 ALR 973. Anno: 120 ALR 476.

On pages 548-549, supra, 17 Am Jur2d, Contracts, cases are cited from Alabama, Georgia, Kentucky, South Carolina, Texas, Maryland, New York, Massachusetts, New Hampshire, Oregon and Kansas.

In *McClelland* v. *Cowden*, (CA5 Tex) 175 F2d 601, the court held:

> "Merely because a woman lives in an immoral relationship does not mean that she cannot recover for property purchased by her services and efforts, or for the value of services rendered by her for which she can sue *without relying on the illegal agreement.*"

The action of the trial court in refusing to permit the jury to be instructed on the defense of illegality in the contract between Alexander and Linda Bailey, alias Gigi Marquette, denied appellant the right to defend himself and deprived him of the right to a fair trial in violation of the Fourteenth Amendment. The State Supreme Court erred in failing to sustain the contention of appellant that

the trial court should have instructed the jury on the matter of said defense which is ably supported by record testimony that Alexander parted with his property for illicit sexual relations with appellant's client.

In the case of *Hyde* v. *United States,* 15 F2d 816, 821, the 4th Circuit held that "an instruction, in prosecution for alledged false entry by national bank official, excluding consideration of testimony as to defendant's asking advice as to particular transaction from reputable bankers, was erroneous as excluding showing of good faith.

The case of *Crawford* v. *United States,* 212 U. S. 183, 29 S.Ct. 260, gives special consideration to this subject, because in that case the court said:

> "There is a presumption of harm arising from the existence of an error, committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury."

Continuing, the court in *Crawford* v. *United States,* supra, said:

> "It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment."

The action of the trial and appellate courts runs counter to the well-established principle of law that a charge to the jury is erroneous if it ignores a defense claimed as to which there is evidence before the jury, as was so ably stated by the great Circuit Judge Allen in the cases of *Smith and Smith* v. *United States,* reported in 230 F2d 935, 938-939, where emphasis was placed in the opinion of the court on the fact that the complained of instruction did not properly present Troy Smith's defense.

There is error in the opinion in the statement that the quoted instruction "is the only instruction error which merits our consideration," because the following two instructions are erroneous for the reasons stated in the petition for rehearing filed in the State Court, being that they failed to include the burden on the prosecution to prove appellant guilty beyond a reasonable doubt and to a moral certainty and beyond every reasonable hypothesis of his innocence.

The errors of the State Supreme Court appearing on pages 527-528 of 211 So.2d are so pronounced as to merit special consideration because the rulings there announced deprive appellant of a fair trial, being fundamental to due process of law.

Traditional notions of fair play not only contemplate (*Slagle* v. *State of Ohio*, 366 U. S. 259, 81 S.Ct. 1076 (1961)), but demand that when an accused defends a criminal charge on definite factual bases, supported by record evidence, he not only has the right to request the court to instruct the jury on applicable principles of law, but such request must be granted, otherwise he is deprived of a fair trial and due process of law. Appellant's evidence made a case for the jury and it was the duty of the court to so instruct the jury. By affirming his conviction, the State Supreme Court perpetuated the error and deprived appellant of a fair trial and due process of law.

The right to a fair trial is protected by the due process clause of the Fourteenth Amendment. *Adamson* v. *People of the State of California*, 67 S.Ct. 1672, 322 U. S. 46, 91 L.Ed. 190, 3, 171 ALR 1223; *Lyons* v. *State of Oklahoma*, 64 S.Ct. 1208, 322 U. S. 596, 88 L.Ed. 1481.

Appellant claims he was denied a fair trial and contrary to what the court said in *Lyons* v. *State of Oklahoma*,

supra, the Mississippi Court permitted appellant's trial to be conducted in a manner which amounted to a denial of that fundamental fairness essential to the very concept of justice, and in a way that necessarily prevented him from having a fair trial. See also *Rodgers* v. *Richmond,* 81 S.Ct. 735, 365 U. S. 534; *Irvin* v. *Dowd,* 81 S.Ct. 1639, 366 U. S. 717; *Turner* v. *State of Louisiana,* 85 S.Ct. 546; and *Boles* v. *Stevenson,* 85 S.Ct. 174, 379 U. S. 43.

The questions involved are substantial; they involve the constitutional right of defendant to be tried according to the law and the evidence. Failure of the trial court to instruct the jury on the principles of law applicable in such case(s) denied appellant a fair trial in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution.

The State Supreme Court has repeatedly held that where the prosecution relies upon circumstantial evidence to establish the essential fact that an accused, charged with receiving stolen property, knew or should have known that such property was stolen property, the burden of proof devolves upon the State not only to prove the accused's guilt beyond every reasonable doubt and to a moral certainty, but to the exclusion of every reasonable hypothesis of his innocence. The State Supreme Court said in *Rodgers* v. *Mississippi,* 222 Miss. 23, 75 So.2d 42, 44:

> "The State, therefore, wholly relies upon circumstantial evidence to establish the essential fact that the appellant knew, or should have known, that the whiskey was stolen property. The burden of proof, therefore, devolved upon the State not only to prove the appellant's guilt upon every reasonable doubt but to the exclusion of every reasonable hypothesis of his innocence."

The instructions granted the State on the question of burden of proof against appellant omitted the proposition

that the State not only had the burden to prove appellant's guilt beyond every reasonable doubt, but to the exclusion of every reasonable hypothesis of his innocence, and the error complained of against appellant being perpetuated by the State Supreme Court is a further denial of due process and a violation of the due process and equal protection of the law clauses of the Fourteenth Amendment.

In *Lyons* v. *Oklahoma,* 322 U. S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481, this Court came to grips with the proposition that error in instructions in State Court cases may well deny "due process" under the Fourteenth Amendment, and said that where the circumstances of the case fairly raise the question, it will be decided by this Court. In fact, the Court did consider and pass upon the question in that case.

Appellant's requested instruction was denied, and he was forced to submit his case to the jury without the benefit of his defense that the contract between his client and Alexander was illegal, and hence null and void, and Alexander forfeited any and all claim to the watch, ring and cigarette lighter, thus depriving appellant of trial by due process of law.

An instance of abuse of due process in instructions wherein it was claimed the defendants were tried upon a charge different from that which they were called upon to defend by information, appears in *Carty* v. *United States,* 190 F2d 99, where the court held the giving of instruction that defendants violated migratory bird regulations, whether in baiting areas before season opened to keep birds in the area to be shot, or by placing grain in front of blinds during season, whereas the information filed against them specifically charged that such migratory birds were taken by defendants over baited ponds and areas by means, aid and use of shelled grain, deprived defendant of a fair trial.

In *Rodgers* v. *Richmond*, 365 U. S. 534 (1961), 81 S.Ct. 735, at page 743, this Court held that a State defendant should have opportunity to have all issues which may be determinative of his guilt tried by a State judge or State jury under appropriate State procedures which conform to requirements of the Fourteenth Amendment.

The State Supreme Court in *McAlphin* v. *Mississippi*, 123 Miss. 528, 86 So. 339, said that in a prosecution for receiving stolen property, the ownership of said property must be proven as laid in the indictment. The decision of the State Court against appellant denies appellant the equal protection of the law.

In the case of *Irvin* v. *Dowd*, 366 U. S. 717, 81 S.Ct. 1639, a habeas corpus proceeding by state prisoner to test the validity of his conviction for murder and sentence of death, this Court granted certiorari and held, opinion by Mr. Justice Clark, that the prisoner's detention and sentence of death pursuant to a judgment of conviction for murder following verdict of guilty by a jury which was not impartial according to constitutional standards was a violation of the Federal Constitution and the prisoner was entitled to be freed therefrom. Although the facts in the case at bar are different, it is nevertheless arguable that the right to jury trial guarantees to criminally accused a fair trial by a panel of jurors properly instructed as to the law of the case, and that the failure of the State Court to grant appellant's requested instruction complained about likewise denied him a fair hearing and violates minimal standards of due process under the Fourteenth Amendment.

A case similar to *Irvin* v. *Dowd*, supra, is *Turner* v. *Louisiana*, 379 U. S. 466, 85 S.Ct. 546, where the court said that a juror's verdict must be based upon the evidence developed at the trial, and it would seem to go without saying that a necessary concomitant of that rule would be that said juror's

verdict must also be derived from the law and the evidence after proper instructions from the trial judge. In the case against appellant, as pointed out, the State Court did not require the jury to be instructed on the evidence of the illegality of Alexander's agreement with appellant's client, as bearing upon his title to, and right of possession of, the property allegedly stolen from him, being his watch, ring and cigarette lighter. In these circumstances, it would appear obvious that appellant was denied a fair trial by being deprived of due process of law and the equal protection of the law under the Fourteenth Amendment.

Like *Rodgers* v. *Richmond*, supra, and to the same effect is the case of *Boles* v. *Stevenson*, 379 U. S. 43, 85 S.Ct. 174, where this Court held a state defendant should have opportunity to have all issues which may be determinative of his guilt tried by a state judge or state jury under appropriate state procedures which conform to requirements of the Fourteenth Amendment.

In *Kregger* v. *Bannan*, 273 F2d 813, the court held a prisoner was not deprived of due process by action of State Court in directing jury to give no consideration to defendant's claim of insanity because he introduced no testimony to the effect that he was insane at the time of killing with which he was charged, and prisoner was not entitled to habeas corpus on such ground as being a violation of his constitutional right under the Fourteenth Amendment. In appellant's case, as we have abundantly shown, and the record conduces to easy proof, the testimony is overwhelming that his client entered into an illegal contract with the State's witness Alexander and there is substantial evidence to support her defense to stealing said witness's property, and likewise to the charge that appellant received stolen property, knowing it to have been stolen, with the intent to convert it to his own use and benefit. The failure of

the State Courts, the trial court in the first instance, and finally the State Supreme Court, to grant appellant's requested instruction, and the Appellate Court to order a new trial for such error deprived appellant of his right to trial by jury according to the law and the evidence and denied him due process of law under the Fourteenth Amendment.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. The questions posed for decision here have not been, but ought to be, decided by this Court. It is therefore respectfully submitted that probable jurisdiction, at least, should be noted.

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IN THE SUPREME COURT OF MISSISSIPPI

No. 44,940

ROBERT A. BENNETT

V.

STATE OF MISSISSIPPI

BRADY, JUSTICE:

The appellant appeals from a judgment of the Circuit Court of Harrison County wherein he was convicted of receiving stolen goods, fined the sum of $250 and costs, and disbarred from the practice of law. His disbarment was suspended and he was placed on probation for a period of five years. Prior to the trial on the merits, appellant filed a motion to quash the indictment, a motion for return of the seized property and a motion to suppress the evidence. The grounds upon which these three motions were predicated were that the evidence procured and obtained against the defendant was incompetent, was obtained in an unlawful and illegal manner without search warrant and without a warrant for the arrest of defendant.

As will be reflected in the statement of facts and in the opinion, the lower court was correct in overruling appellant's three preliminary motions. The demurrer to the indictment was properly overruled because the indictment was properly drawn under Mississippi Code 1942 Annotated section 2249 (1956) and stated a violation of said section.

The trial court sustained the motion of the State to amend the indictment so that the name of the watch described in the indictment could be changed from "one silver EPEC watch" to "one silver EBEL watch." The act of the trial court in permitting the amendment is assigned as one of

the seventeen errors in support of a reversal. The trial court properly permitted the amendment for the reason that the variance was not material to the merits of the case and the defendant was not prejudiced thereby in his defense on the merits. The amendment permitted did not constitute a new indictment or a new description which would prevent the appellant from understanding the offense with which he was charged. Miss. Code 1942 Ann. § 2532 (1956); Jones v. State, 215 Miss. 355, 60 So.2d 805 (1952); Horn v. State, 165 Miss. 169, 147 So. 310 (1933); Davis v. State, 146 Miss. 322, 111 So. 564 (1927); and Freeman v. State, 108 Miss. 818, 67 So. 460 (1915).

On the night of November 8, 1966, Homer B. Alexander, a resident of Dallas, Texas, and a traveling salesman, registered at a motel on the beach in Biloxi, Mississippi, and was assigned to room 125. After having dinner he proceeded to visit several nightclubs, imbibing freely of sundry alcoholic beverages. He met a girl named Linda Bailey, also known as "Gigi" (Marquette), with whom he drank and for whom he purchased a bottle of champagne to be consumed in the room at the motel. She accepted his proposition and they went to his motel room. He had squandered all of his money in his riotous living except $20. The record discloses that $25 was the price which his Dulcinea expected.

Upon reaching his motel room and lying down upon the bed he was overcome by his alcoholic intake and remembered nothing. When he awoke about 10:00 o'clock the next morning and reached for his watch, valued at $75, to see what time it was he found it was gone; also his diamond ring valued at $350 and his cigarette lighter of a value of $14 were missing. His shirt and tie, the $20 he had when he went to sleep, and a bottle of Scotch whisky were also missing.

Mr. Lawrence Taylor, the manager of the motel arrived at work around 6:00 A.M. After he had parked his car he saw a woman come out of room 125 with several articles in her hands. She was in a hurry and was rushing to get into a taxicab which was parked in an area prohibited by the motel. Mr. Taylor tried to stop the cab driver but was unsuccessful. However, he did succeed in getting the cab's license number. After discovering that the above named articles had been stolen, Mr. Alexander telephoned the office and reported to Mr. Taylor that he had been robbed. Mr. Taylor then called for the police who came to the motel and Alexander told them what had happened, and gave them a description of his missing articles. Mr. Taylor furnished the police with the license number of the cab and told them to find out who the driver was. The driver revealed the name of the young woman whom he had transported from the motel. Shortly thereafter the police officers of Biloxi picked up the young woman and brought her to the motel where she was identified by Mr. Alexander as the woman whom he had taken into room 125 the night before. Subsequently, Mr. Alexander made an affidavit charging her with stealing his ring, his watch, and his cigarette lighter, of the aforesaid values. "Gigi" was arrested and placed in jail.

After conducting his business for the day, Mr. Alexander returned to his room around 5:30 and found that the message light in his room was on. Upon calling the desk he ascertained that there had been a call from an attorney named Bennett who wanted to talk with him and who had left his number. He telephoned Bennett, the appellant, who advised him that "Gigi" was not his client but that he was acting as a favor for a friend and that Alexander had identified the wrong girl. Alexander replied that as far as he was concerned she was the right

girl and what he wanted was to get his merchandise back. He inquired as to what his chances were of getting the merchandise back. Alexander testified that Bennett replied "they are slim or nothing, I am going to have to charge them $500 to represent them, and they will either have to sell the merchandise to pay for that fee or they will throw it in the ocean one. You will never see it. Are you going to be in town tomorrow?" Alexander further testified that in about twenty or thirty minutes appellant called back to the motel and stated that he would like to see him in the lobby of the motel about 8:00 P.M., advising him "there might be a possibility of your getting your stuff back."

When Alexander returned appellant's call appellant was at the police station seeking to obtain "Gigi's" release. Mrs. Thelma Jean Kenniston had called appellant asking him to secure "Gigi's" release and had furnished $100 in cash in order to obtain the $1,000 bond. "Gigi's" release was effected and appellant and his wife drove his client to the trailer where she had been living, in order that she could check and be sure that all of her belongings had been removed. After determining that all her belongings had been removed she then went to her fiance's car and from the back seat she took Alexander's ring, watch, and lighter and gave them to appellant. Appellant then locked them in the trunk of his car.

Appellant drove to the motel and met Mr. Alexander in the lobby. The substance of this conversation was that Alexander could get his belongings back but the appellant would have to charge him $500 or $1,000; that "Gigi" wanted to sue Mr. Alexander for false arrest. Mr. Alexander went to the office of the motel and asked if they would cash his check for $500. Mr. Taylor refused to cash the check but told Mr. Alexander that he would cash a

check in the morning. Mr. Alexander advised appellant that he would have to call his wife and be sure that his check was honored, and he asked Bennett how he planned to get the merchandise back. Although the appellant had the merchandise at this time in the trunk of his car, he advised, according to Mr. Alexander, that "I will just go down and park my car in a certain location and tell them my car is there, and I will go and get a cup of coffee and when I come back I want it in the glove compartment, and it will be in the glove compartment." Mr. Alexander advised appellant that he did not have the kind of money that appellant was requesting and that the appellant then lowered the price, stating, "Well, maybe for the $100 bond they had to pay to get her out of jail, and a $100 for my fee, we might can work out something." Alexander then went to Mr. Taylor again seeking to cash a check for $200, which Mr. Taylor said he would not do until the next morning. Appellant agreed to meet with Mr. Alexander the next morning around 8:30.

The next morning Mr. Taylor called the bank and advised the bank to take the serial numbers from bills totaling $200, which was done. An employee of the motel went and picked up the bills. Appellant came into the lobby of the motel and met Mr. Alexander at a table situated therein, as had been agreed on the night before. Mr. Alexander endeavored to have the check for $200 cashed but was advised that the bank did not open until 9:00 o'clock and that the check would be cashed at 9:00. Appellant and his wife then left the motel and had a cup of coffee and returned to the motel. Appellant walked into the lobby with the ring, watch and lighter in his hand and also a sheet of paper on which the appellant had written a release which he said was signed by "Gigi." Appellant had heretofore assured Mr. Alexander that he

would protect him by getting a release from his client so that she could not bring a suit against him for false arrest.

Mr. E. P. Vincent, Chief of Detectives of the Police Department, had been called by Mr. Taylor and was standing behind the desk with Mr. Taylor at the time appellant returned to the motel. The appellant laid the three articles of Mr. Alexander on the table asking him if these looked familiar to him. Alexander then went to the desk and cashed the $200 check, receiving the marked bills, and came back and counted the money out to appellant. Appellant laid the three articles on the table and was counting the money himself when Mr. Vincent came up and took the money out of his hand and arrested him. Mr. Taylor, Mr. Vincent and Mr. Alexander all stated that the appellant had the money in his hand when it was seized and it was not in appellant's pocket as appellant urges. Mr. Vincent picked up the ring, the watch and the lighter, and also the release which was in the following language:

"Release

"I hereby release H. B. Alexander from all causes of action whatsoever in return for his dropping all charges against me.

s/ Linda Bailey

"Dated this 10th day of November, 1966."

Mr. Alexander identified the property as his and stated the diamond ring was worth $350, the watch worth $75, and the cigarette lighter worth $14. Repeatedly the appellant stated, when he took the stand in his own behalf, that "Gigi" had told him that Mr. Alexander had given her the property; that the property was to be held as security and that when he paid her fee the items would be returned to him. When she was brought into the police station in the

presence of the officers, including Chief of Detectives Vincent, she denied that she had stolen the property and asserted that Alexander had given it to her. Appellant urged when testifying and urges in his brief that he had a right to rely upon the statements of his client in defense of the State's charge of his receiving stolen property.

The jury found the appellant guilty and he was disbarred by the trial judge from the practice of law as required by Mississippi Code 1942 Annotated section 8667 (1956) and was sentenced to pay a fine of $250 and costs. The trial court, however, suspended the disbarment sentence and placed the appellant under the supervision of the State Probation and Parole Board until the trial court in term time, or the judge in vacation, shall alter, extend, terminate or direct the enforcement of the above sentence, basing the suspension of said sentence on the usual and prerequisite requirements of the parole act.

Seventeen different assignments of error are urged. Only those errors which we feel are meritorious will be considered in this opinion. The first error assigned which merits our consideration is that the evidence used in the trial was obtained by an unconstitutional search and seizure and therefore is inadmissible and vitiates the conviction. Appellant's contention that the appellee violated the appellant's right of privacy under the Fourth Amendment and right of due process under the Fourteenth Amendment is without merit. In support of the first assignment appellant cites *Lanza* v. *State of New York,* 370 U. S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962); *Mapp* v. *Ohio,* 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Smith* v. *State,* 228 Miss. 476, 87 So.2d 917 (1956); and *Brooks* v. *State,* 209 Miss. 150, 46 So.2d 94 (1950). We have no argument with appellant's contention that *Mapp* v. *Ohio* and *Lanza* v. *State, supra,* accurately state the law and that

Smith v. State and *Brooks v. State, supra,* are accurate pronouncements of the rule with reference to an unconstitutional search and seizure and the inadmissibility of evidence obtained thereunder. The facts in these cases are clearly distinguishable from the case at bar. It is to be remembered that in the case at bar the felony was committed in the presence of the officer. No search warrant was necessary as the stolen property was seen in appellant's possession by an officer just prior to his arrest. It is undisputed that "Gigi" was charged with stealing Alexander's property; that an affidavit had been made against her; that she had been arrested and was placed in jail. The proof is evident that the appellant had full knowledge of all these facts and furthermore the appellant saw "Gigi" remove the stolen property from the back of the car where it had been secreted. The appellant had every reasonable ground as a reasonable man to know that the property which he locked in the trunk of his car was stolen property and that this property was taken by "Gigi." Chief of Detectives E. P. Vincent had reasonable grounds to suspect that appellant was committing a felony in violation of Mississippi Code 1942 Annotated section 2249 (1956) which provides as follows:

> If a person buy or receive in any manner or on any consideration personal property of any value, feloniously taken away from another, knowing the same to have been so taken, he shall be guilty of receiving stolen goods, and, on conviction, shall be punished by imprisonment in the penitentiary not more than five years, or by imprisonment in the county jail not more than six months, and by fine, not more than two hundred and fifty dollars.

In the case at bar the appellant was notified subsequent to the time that Mr. Vincent seized the money out of appellant's hand that he was under arrest. We have repeatedly held that an arrest without a warrant, otherwise

legal, is not rendered illegal by the failure of the arresting officer to inform the person arrested of the object and cause of his arrest. Fuqua v. State, 246 Miss. 191, 145 So.2d 152 (1962), appeal dismissed, and cert. denied, 372 U. S. 709, 10 L.Ed.2d 125, 83 S.Ct. 1018, rehearing denied, 373 U. S. 947, 10 L.Ed.2d 703, 83 S.Ct. 1536 (1963). In the *Smith* case, urged by appellant, we held the search to be unlawful because the reasons for allowing the arrest to be made without a warrant had disappeared. The search in the *Smith* case was no longer incident to the arrest. As was explained in the *Smith* case, "Section 2470 . . . authorizes the arrest without warrant for an indictable offense committed in the presence of an officer. If the arrest was legal, the search was legal, 79 C.J.S. *Searches and Seizures* section 68."

In the presence of Chief of Detectives Vincent and Mr. Taylor, appellant passed the stolen property to Mr. Alexander. This act was seen by Mr. Vincent, who saw the stolen property in the hands of appellant, and therefore justified the arrest by Mr. Vincent of appellant and the taking of the evidence from him. We have held the eye cannot commit a trespass and we hold that the arrest in the case at bar was legal and did not violate any of the appellant's rights under the United States Constitution or the Constitution of the State of Mississippi. Reed v. State, 199 So.2d 803 (Miss. 1967); Wilson v. State, 186 So.2d 208 (Miss. 1966). In *Reed* we held that where an official has probable cause for arrest and the misdemeanor is committed in his presence the search is reasonable. That Vincent had a probable cause in the case at bar is beyond dispute.

Appellant's assignment of error that the proof is insufficient to show that appellant knowingly received stolen goods is without merit for the reasons hereinabove given. As we have heretofore said in *Francis* v. *State*, 154 Miss.

176, 122 So. 372 (1929), ". . . where circumstances warrant the conclusion that they were stolen by another, and they are traced to the possession of the defendant, under circumtances sufficient to make him believe they were stolen, this is sufficient to uphold a conviction. By knowing them to be stolen is not meant that the defendant should personally have witnessed the theft. If the transaction is such as to convince him, or as should do so, that the things were stolen, and he received them, he has knowledge to make him guilty." (154 Miss. at 178, 122 So. at 373.)

Likewise, in *Pettus* v. *State*, 200 Miss. 397, 27 So.2d 536 (1946), we said:

> [T]he word "knowing" in its relation to receiving stolen goods means that, if a person has information from facts and circumstances which should convince him that property has been stolen, or which would lead a reasonable man to believe that property had been stolen, then in a legal sense he knew it. (200 Miss. at 410, 27 So.2d at 540.)

There is no merit in the error assigned by appellant that the trial court should have permitted appellant on the voir dire examination to advise the jury of the mandatory disbarment required in section 8667. The mandatory disbarment of a lawyer convicted of a felony has no bearing whatsoever on the guilt or innocence of that lawyer who is charged with a felony. The jury's duty was to weigh the evidence which was presented to them and to find as a matter of fact whether or not the appellant was guilty of the crime with which he was charged and for which he was tried. The appellant's guilt or innocence was the concern of the jury and not whether the appellant should be disbarred or not disbarred. The sentence, insofar as the disbarment is concerned, was statutorily imposed and it was not within the provision of the trial judge to say whether or not the appellant should be disbarred. The trial court

was under the mandate of the legislature to disbar the appellant upon conviction. It follows, therefore, that refusal of the trial court to allow counsel to apprise the jury of the nature of the disbarment penalty during the voir dire examination did not constitute error. Furthermore, appellant has not presented the reasons why the knowledge of the jurors of the penalty imposed would affect their functions as the finders of fact. Moreover, appellant has waived this assignment of error by not so arguing. Dozier v. State, 247 Miss. 850, 157 So.2d 798 (1963); Bridges v. State, 154 Miss. 489, 122 So. 533 (1929); and Johnson v. State, 154 Miss. 512, 122 So. 529 (1929).

Appellant urges that there is no proof in the record that the personal property of the State's prosecuting witness, Alexander, was feloniously taken from him as charged in the indictment and that appellant received said property knowing that it had been feloniously taken from Mr. Alexander. There is no merit in this assigned error for the reason that the proof conclusively shows that Alexander testified that the watch, ring and cigarette lighter were stolen from him by "Gigi" Marquette. The proof conclusively shows that the appellant knew that Alexander asserted that his property had been stolen and that Alexander had made an affidavit to this effect. Appellant knew that the items which Alexander stated were stolen were in the possession of his client, "Gigi" Marquette, and furthermore he saw her remove them from the back of a car where they had been placed by her fiance. These were questions of fact and were determined by the jury when they rendered their verdict against appellant. The proof is ample to justify the verdict which the jury returned. The essential ingredients of knowing that the goods were stolen was met by the State's evidence. Pettus v. State, 200 Miss. 397, 27 So.2d 536 (1946); Francis v. State, 154 Miss. 176, 122 So.

372 (1929); and Frank v. State, 67 Miss. 125, 6 So. 842 (1889).

There is no merit in the error assigned by appellant that the State's witness, Alexander, was not entitled to the possession of his property. The possession of the property is not involved in the prosecution of the suit against appellant and the legality or illegality of the purported contract likewise has no place in this cause. State's prosecuting witness, Alexander, was entitled to receive the property which had been stolen from him subsequent to the disposition of the case.

We have carefully read the instructions granted and refused the State and appellant and must concede that they contain no reversible error and therefore there is no merit in this assignment of error by appellant. The trial court granted the State an instruction which is as follows:

> The Court instructs the jury for the State that you do not have to know that the Defendant is guilty before you can convict him; it is only necessary that you should believe from the evidence, beyond a reasonable doubt, that he is guilty, and if you do so believe from all of the evidence, beyond a reasonable doubt, then the defendant is guilty, and it is your sworn duty to say so by your verdict.

Appellant urges that this is reversible error, and this is the only instruction error which merits our consideration. We pointed out in Drummond v. State, 103 Miss. 221, 60 So. 138 (1912) that while this instruction was erroneous it was harmless error because no honest and reasonable jury could have rendered any other verdict. In the case at bar, under all the facts and with all the instructions considered together, the jury could not have honestly and reasonably found the appellant not guilty. The instructions granted the state relating to the knowledge neces-

sary on appellant's part that the goods were stolen before he can be convicted are not erroneous. Frank v. State, *supra;* Daniel v. State, 212 Miss. 223, 54 So.2d 272 (1951). Under the facts the appellant was properly denied a peremptory instruction. The appellant was not prejudiced by the trial court's refusal to grant the other instructions requested by the appellant.

In conclusion, insofar as the direct appeal is concerned, we are required to hold that the trial court properly refused to grant a new trial, and that appellant received a fair and impartial trial. McLelland v. State, 204 So.2d 158, sugg. of error overruled (Miss. 1967).

The briefs filed in this case are exceptionally well prepared. Every possible legal ground in appellant's behalf is urged by counsel representing him. No safeguard to his rights has been overlooked, but the verdict of guilty and the judgment thereon is affirmed insofar as the guilt of the appellant is concerned.

On Cross Appeal

The State filed a cross appeal and assigns as error the action of the trial court in suspending appellant's disbarment and placing appellant on probation for five years. The judgment of conviction ordered the disbarment of appellant and immediately thereafter the order provided that the order of disbarment was suspended and the appellant was placed on probation for five years under the supervision of the probation and parole officer. The conditions of the probation were as set out in Mississippi Code 1942 Annotated section 4004-24 (1956) with the additional provision that the appellant was to abide by the ethics of the legal profession.

The crime for which appellant was convicted is a felony. Mississippi Code 1942 Annotated section 8667 (1956) provides as follows:

> Every person who has been or shall hereafter be convicted of felony, manslaughter excepted, shall be incapable of obtaining a license to practice law; or, if already licensed, the court in which he shall have been convicted shall enter an order disbarring such convict.

This Court held in *Ex parte Crisler,* 159 Miss. 247, 132 So. 103 (1931) that a full pardon of an attorney after he had been disbarred because of conviction of a felony absolved the attorney from all consequences of the order of disbarment and entitled him to reinstatement.

In *Disbarment of Prisock,* 244 Miss. 417, 141 So.2d 715, suggestion of error overruled 244 Miss. 423, 143 So.2d 434 (1962) the Court held that an attorney convicted of a felony was automatically disbarred as a part of his punishment. It is argued that because the disbarment has been said to be a part of the punishment that the circuit judge may therefore suspend the disbarment as provided by Mississippi Code 1942 Annotated section 4004-23 (Supp. 1966).

After the *Crisler* case was decided in 1931 a comprehensive act was passed by the legislature, being Chapter 121, Laws of 1932, providing for the organization, regulation and government of the Mississippi State Bar and for the first time requiring all lawyers practicing within this State to become members of the association. It defined the duties of the association and its board of governors. One of the provisions of that law is now Mississippi Code 1942 Annotated section 8714 (1956) which provides the procedure for the reinstatement of any mem-

ber of the bar who has heretofore or who may hereafter be disbarred. This statute is in part as follows:

> When any member of the bar who has heretofore been, or who may hereafter be suspended or disbarred, and after a period of probation, suspension or disbarment, he wishes to be reinstated, he may present his petition for reinstatement to the Board of Commissioners and when said petition so presented is granted by said board through its written endorsement on said petition then said disbarred or suspended member is authorized to file his petition in either the chancery or circuit court; or said suspended or disbarred member shall have the right to file a separate and independent petition seeking reinstatement before the chancellor or the circuit judge of the county of the residence of said suspended or disbarred member, and when petition in either case has been filed, a written notice shall be served the same as summonses are served, upon the secretary of the Mississippi State Bar, at least ten days before the hearing, notifying him that said proceedings have been instituted, whereupon the said secretary shall notify the Board of Commissioners, who shall attend the hearing or have a representative attend the hearing, for the purpose of representing the State Bar in such proceedings.

Also a part of the 1932 State Bar Act is the present Mississippi Code 1942 Annotated section 8716 (1956), which provides that the circuit or chancery court of the county in which the party whose interest is involved resides, shall have exclusive original jurisdiction in all matters pertaining to disbarment, but either party may appeal to the Supreme Court. In our opinion, Code section 4004-23 (Supp. 1966) giving the judges of the circuit and county courts power to suspend sentence and place defendants on probation is not applicable to the matter of mandatory disbarment of an attorney upon conviction of

a felony. The power to suspend sentence is limited "to suspend the imposition or execution of sentence" as provided by said section 4004-23. The Provision with reference to disbarment of an attorney upon conviction of a felony and the provision for the proceedings for reinstatement are in the chapter of the Code on "Professions and Callings," specifically, the chapter on "Attorneys."

7 Am. Jur. 2d *Attorney at Law* section 53 (1963) is in part as follows:

> In the absence of a controlling statute, it has been held that granting probation to an attorney convicted of a crime does not affect the question whether the attorney should be suspended or disbarred because of the conviction.

See also Annotation, 132 A.L.R. 659 (1941).

In our opinion the power of the circuit judge to suspend sentence does not empower him to suspend the order of disbarment. The disbarment order is a part of the punishment but it is not a part of the sentence which the circuit judge metes out and may suspend. The order of disbarment automatically follows conviction. We are of the opinion that the legislature never contemplated that a lawyer convicted of a felony would be allowed to continue practice under the direction of a probation or parole officer. The probation and parole statute is concerned with punishment and rehabilitation, while the statute requiring the disbarment of an attorney upon conviction of a felony is concerned with guilt. Reinstatement of a disbarred attorney under section 8714 is an entirely different matter from probation and parole. We are therefore of the opinion and so hold that the circuit judge erred in suspending the order of disbarment, and that part of the judgment of conviction is reversed and the order of disbarment is reinstated.

This is a lamentable case, one which generates regret. It is lamentable that a member of the bar would so conduct himself as to be found guilty of a felony in the representation of his client. It is regrettable that because of this violation the attorney must be disbarred. But the practice of law is a sacred trust, accorded only to a properly qualified attorney. As an officer of the courts he must keep that trust inviolate. When he desecrates that trust and violates the laws controlling, he has, upon conviction thereof, terminated his right to represent clients and practice the great and honorable profession of law.

On direct appeal the judgment of conviction is affirmed. On cross appeal the suspension of the disbarment order is reversed and the order of disbarment is reinstated.

AFFIRMED ON DIRECT APPEAL; REVERSED AND RENDERED ON CROSS APPEAL.

ALL JUSTICES CONCUR.

Monday, June 10, 1968, Court Sitting:::::::

Robert A. Bennett

44,940 vs.

State

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is partial error therein doth order and adjudge that the judgment of conviction of said Circuit Court rendered in this cause on the 14th day of July, 1967, is affirmed on direct appeal; on cross-appeal the suspension of the disbarment order is reversed and the order of disbarment is reinstated. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant and Harry Bennett and Albert Sidney Johnston, Jr., sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

BENNETT *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 719. Decided January 13, 1969.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.